80999-2

Court of Appeal Cause No. 253279

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

Dale Campbell and Tina Fereira, Petitioners

v.

Ticor Title Insurance Company, Respondent

PETITION FOR REVIEW

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Cases

A. Identity of Petitioner

Dale Campbell and Tina Fereira ask this Court to accept review of the Court of Appeals decision termination review designated in Part B of this Petition.

B. Court of Appeals Decision

Unpublished Opinion by Division III of the Court of Appeals filed on June 26, 2007, and Order Denying Motion for Reconsideration filed August 15, 2007.

A copy of the decision is in the Appendix at pages A-1 through A-7. A copy of the Order Denying Petitioners' Motion for Reconsideration is in the Appendix at page A-8.

C. Issues Presented for Review

Whether the issuer of a title insurance policy that excludes from coverage "easements, prescriptive rights, rights of way, streets, roads, alleys or highways not disclosed by the public record" has a duty to defend its insured against a claim asserting a right to use the insured's property based upon a "Declaration of Pedestrian Easement" that was properly recorded in the county where the property is located prior to the issuance of the policy.

D. Statement of the Case

On or about March 14, 2001, Dale Campbell and Tina Feriera ("Campbell-Feriera") purchased from Respondent Ticor Title Insurance Company ("Ticor") policy Number 48 1005 106 7777 (Exhibit B to the Complaint) insuring title to certain real property located in Stevens County, Washington. CP 54. The policy provided insurance against "loss or damage, not exceeding the amount of insurance stated in Schedule A,

sustained or incurred by the insured by reason of: 1. Title to the estate or interest described in Schedule A being vested other than as stated therein; 2. Any defect in or lien or encumbrance on the title; 3. Unmarketability of the title. 4. Lack of a right of access to and from the land." CP 54. The coverage portion of the policy further states that Ticor would pay "the costs, attorney's fees and expenses incurred in defense of the title, as insured." CP 54.

In October, 2005, Campbell-Fereira were served with a Summons and Complaint filed in Spokane County, Washington, by Jerry Edwards ("Edwards"), the owner of Lot C, which is adjacent to the Campbell-Fereira property. CP 6. In the Complaint, Edwards claimed a legal right to enter onto and cross over the Campbell-Fereira property in order to gain access to Deer Lake based upon a "Declaration of Pedestrian Easement" that was recorded on December 5, 1996 under Stevens County Auditor's Number 9612935. CP 40. The Summons and Complaint were later refiled in Stevens County, Washington.

The legal description contained in the "Declaration of Pedestrian Easement" states that Lot C is granted an easement over "Lot B" for the purpose of accessing an existing dock on Deer Lake. "Lot B," which is owned by the Gromo Family Trust ("Gromos"). CP 40. The Gromo house lies immediately to the south of the Campbell-Feriera property (Lot A). Edwards alleged in his Complaint that Frank and Rita Vickery ("Vickerys"), who were the original grantors of Lot C, Lot B and Lot A, had intended to place the pedestrian easement so that it would lie between the Campbell-Fereira house and the Gromo house. CP 16. Edwards further alleged that Mr. Vickery erred in drafting the Declaration of Pedestrian Easement so that boundary line between the Campbell-Fereira property and the Gromo property actually ran through the Gromo house, thus preventing

access to the lake between the two houses over Lot B. CP 17. Edwards requested that the Gromos and Campbell-Fereira deeds be reformed "to reflect the true intention of the Vickerys as the original grantor." CP 17. Although the Complaint did not specify precisely how the Gromo and Campbell-Fereira deeds were to be reformed, it is clear from the allegation of the Complaint that, in addition to other relief requested against other defendants, Edwards is seeking access to the lake over property that belongs to Campbell-Fereira based upon the recorded "Declaration of Pedestrian Easement."

Campbell-Fereira notified Ticor of the Edwards lawsuit. On January 20, 2006, Ticor responded to the Notice of Claim by letter to plaintiff's attorney. CP 65. In the letter, Ticor denied coverage and also denied any duty to defend. Ticor stated in its letter that the claims set forth in the Edwards' Complaint were exempted from coverage by a provision in the policy excluding coverage for "easements, prescriptive rights, rights of way, streets, roads, alleys or highways not disclosed by public record." According to Ticor's letter, "[i]t is uncontroverted that on the date that Ticor's title policy was issued to Ms. Fereira and Mr. Campbell, there was no easement of record across their property in favor of Lot C [the Edwards property]." CP 66.

As an additional basis for denying coverage and Campbell-Fereira's tender of defense, Ticor stated that coverage was excluded pursuant to a provision excepting defects, liens, encumbrances, adverse claims, or other matters "attaching or created subsequent to the date of policy." CP 66. Ticor asserted that, even if Mr. Edwards is successful in his efforts to reform the existing grant of easement to encumber the Campbell/Fereira property, it will be a matter which attached or was created subsequent to the date of the policy." CP 66.

Campbell-Fereira brought this action against Ticor and moved for summary judgment on its claims for failure to defend, bad faith, violation of Washington's Consumer Protection Act, and failure to indemnify. CP 67. Ticor cross-moved for Summary Judgment on all claims. CP 86. The trial court denied Campbell-Fereira's motion for summary judgment and granted Ticor's cross-motion for summary judgment. CP 95. Campbell-Fereira's motion for reconsideration was denied. CP 104. Campbell-Fereira timely appealed to the Court of Appeal, Division III, which affirmed the trial court.

E. Argument Why Review Should Be Accepted

1. The decision of the Court of Appeals in this case directly conflicts the with prior decisions of this court holding that an insured's duty to defend arises whenever an action is brought against the insured alleging facts that could conceivably result in a covered loss.

In upholding the decision of trial court, the Court of Appeals relied on *Kirk v. Mt. Airy Ins. Co.*, 134 Wn.2d 558, 561, 951 P.2d 1124 (1998) for the proposition that "an insurer has not duty to defend claims that are not covered by the policy." Opinion at p. 5. The Court then commits an error of law by proceeding with an analysis that equates the scope of an insurer's duty to defend with the scope of liability for a covered loss and determining that the recorded "Declaration of Pedestrian Easement" did not create an easement over Lot A (the Campbell-Fereira property) in favor of Lot C (the Edwards property).

This court, however, has made it clear that an insurer's duty to defend is separate from and broader than the duty to indemnify. *Hayden v. Mutual of Enumclaw Ins. Co.*, 141 Wn. 2d 55, 64, 1 P.3d 1167 (2000). The duty to defend arises whenever a complaint

made against the insured contains any factual allegations that might render the insurer liable to the insured under the policy. *Id.* The complaint must be liberally construed and the insurer must defend if the claim is potentially covered under the policy, even if there is no actual covered loss. *Bosely v. American Motorists Ins. Co.*, 66 Wn. App. 698, 701 P.2d 148 (1992). In other words, if the complaint is subject to any reasonable interpretation that would give rise to coverage, the insurer must defend. *See Anthony v. Stiles*, 81 Wn. App. 670, 673, 916 P.2d 435 (1996).

The Court of Appeals ruling here completely ignores the foregoing well-settled principals of law and, instead focuses on the form of relief sought by Edwards. At the very beginning of its opinion, the Court of Appeals incorrectly states that Edwards sued Campbell-Fereira to "reform" and easement that did not burden their property. Opinion at p. 1. In fact, by seeking access to the lake over the Campbell-Fereira property based upon the recorded "Declaration of Pedestrian Easement," the Edwards' complaint necessarily alleges that the recorded easement does burden the Campbell-Fereira property, otherwise, there would be no basis for seeking any relief against Campbell-Fereira or their property. Based upon its erroneous interpretation of the Edwards complaint, the Court of Appeals then concludes, also erroneously, that the "potential encumbrance was not of public record within the meaning of the policy."

The Court of Appeals then compounds its error by failing to even address whether any of the facts alleged in the Edwards Complaint, if proved, could conceivably result in a covered loss; i.e., whether the court in the Edwards action could potentially rule that the recorded "Declaration of Pedestrian Easement" as written gives the owner of Lot C a right to cross over the Campbell-Fereira property. Rather, the Court attempts to

predetermine the outcome of the Edwards action against Campbell-Fereira by stating as a fact that "[t]here was no recorded easement benefiting Mr. Edwards' property and burdening Campbell-Fereira's land on the date Ticor issued the policy."

Whether or not the recorded "Declaration of Pedestrian Easement" benefited Lot C (now owned by Edwards) and created a burden on Lot A (now owned by Campbell-Fereira) is not a fact, but is a question of law that can only be determined in the action brought by Edwards against Campbell-Fereira, and not in this action. The only issue that can be addressed in this action relative to the merits of the Edwards claim against Campbell-Fereira is whether the alleged facts give rise to a claim that is "conceivably covered" by the policy. *Hayden v. Mutual of Enumclaw Ins. Co.*, 141 Wn. 2d at 64.

> The duty to defend is one of the main benefits of the insurance contract. The duty arises at the time the action is first brought, and is based on the potential for liability. The duty to defend 'arises when a complaint against the insured, construed liberally, alleges facts which could, if proven, impose liability upon the insured within the policy's coverage.' Only if the alleged claim is clearly not covered by the policy is the insurer relief of its duty to defend. If the complaint is ambiguous it will be liberally construed in favor of triggering the insurer's duty to defend.

Truck Ins. Exch. v. Vanport Homes, Inc., 147 Wn.2d 751,760, 58 P.3d 276 (2002)(citations omitted). This court has never held or even suggested that the form of relief requested in a complaint determines whether a claim is potentially covered by a policy of insurance. By relying on the form of relief requested in the Edwards complaint as a basis for relieving Ticor of its duty to defend, the Court of Appeals here has created an unwarranted and unjustified exception to existing law in the State of Washington defining an insurer's duty to defend. This court should accept review to correct that error by the Court of Appeals and to reestablish the legal principals set forth by this court in

previous decisions such as *Hayden v. Mutual of Enumclaw Ins. Co.* and *Truck Ins. Exch. v. Vanport Homes, Inc.*

2. The Court of Appeals decision severely and inappropriately limits the obligation of title insurance companies in the State of Washington to defend their insureds against claims based upon recorded instruments with the result that property ownership in this state will be less secure.

Whether or not the opinion in this case is published, it will have a significant impact on property owners in the State of Washington. Unpublished Court of Appeals opinions are now widely available though on-line, legal research services such as those provided by Westlaw and Lexis-Nexis. Any attorney who conducts on-line research regarding the duty of an insurer to defend claims against it insured will probably see and read the Court of Appeals' opinion in this case. Even if the case cannot be cited in legal briefs filed in the courts of this state, the opinion will have an impact on how attorneys who practice in this area of the law conduct cases and advise clients.

Home ownership is part of the American dream. For many families and individuals, home ownership is also the most important financial investment they make in their entire lives. To protect that investment, home buyers purchase title insurance policies to insure that they receive clear title to their property unencumbered by adverse claims. Adverse claim against one's real property not only interfere with the owner's quiet use and enjoyment of their property, but also diminish the value of the property and. thus, the value of the home owner's investment.

A policy of title insurance is more than a simple representation that the title insurance company has searched the public record diligently and not found any liens or encumbrances other than those listed in the title report. Rather, a policy of title

insurance, by its very language, is a guarantee that the insurer will receive clear title except for those liens and encumbrances noted in the policy as exceptions.

> In the case of a title insurance policy, the insurer undertakes to indemnify the insured if the title turns out to be defective. That is the purpose of procuring the insurance . . . The doctrine of skill or negligence has no application to a contract of title insurance.

Shotwell v. Transamerica Title Ins. Co., 91 Wn.2d 161, 170, 588 P.2d 208 1978) *quoting, Maggio v. Abstract Title & Mort. Corp.*, 277 App. Div. 940, 941, 98 N.Y.S.2d 1011, 1013 (1950).

Here, Ticor argues that it need not defend against the Edwards claim upon its insured's property because the right asserted by Edwards; *i.e.*, the right to cross over the Campbell-Fereira property to access Deer Lake, constitutes and easement "not disclosed by the public record." Ticor makes that argument even though it is undisputed that the "Declaration of Pedestrian Easement" upon which the Edwards claim is based was recorded with the Stevens County Auditor long before Campbell-Fereira purchased the property. In essence, Ticor claims that the recorded "Declaration of Pedestrian Easement" was not disclosed by the public record because it does not state on its face that it burdened the Campbell-Fereira property.

That argument is completely at odds with the concept of title insurance and insurance in general. As this court has noted, the purpose of title insurance is to protect the rights of the insured if title turn out to be defective in some way that is not specifically exempted from coverage. Nowhere in Ticor's policy does it state that Ticor guarantees only that there are no recorded easements that expressly state on their face that they burden the subject property. There is always the possibility, however remote, that a

recorded document may exist that does not expressly state on its face that it affect a particular property but that, nevertheless, may give rise to a claim or action adverse to the rights of the owners of that property. As with any other type of insurance, the purpose for purchasing title insurance in the first place is to protect the insured against such unanticipated or unknown claims or actions. The situation presented in this case is exactly the type of situation in which a property owner would reasonably and rightfully expect their insurance company to protect them.

Under the theory put forth by Ticor, it would be required to either indemnify or defend its insured only if Ticor negligently failed to list as an exception on the policy a recorded instrument that expressly stated on its face that it affected the subject property. That is neither insurance, nor a guarantee of clear tile. Instead, it amounts to nothing more than a promise to exercise due care in searching the public record.

Here, the recorded "Declaration of Pedestrian Easement" states that is burdens "Lot B," but also includes a drawing that shows the purported easement running between the Campbell-Fereira house and the Gromo house. Based upon that drawing, Edwards claims that he has a right to use the Campbell-Fereira property because he must cross their property in order to walk between the two houses. Looking at the "Declaration of Pedestrian Easement" in its entirety, the court in the Edwards action might rule that the document was sufficient to put Campbell-Fereira on notice of the purported easement. It simply makes no sense whatsoever to place the risk of that outcome on Campbell-Fereira, when Ticor, not Campbell-Fereira, supposedly searched the public record, was or should have been aware of existence of the "Declaration of Pedestrian Easement." and chose not to include it as an exception on the policy. The ability and opportunity to find that

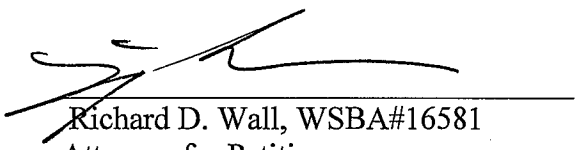
recorded document and determine whether it should have been disclosed as an exception to the guarantee of clear tile was completely within Ticor's control. As a matter of simple logic and sound public policy, Ticor, not Campbell-Fereira should bear the burden of defending claims based upon the "Declaration of Pedestrian Easement." Otherwise, property owners like Campbell-Fereira will have no way of knowing whether they in fact have clear and unencumbered title to the properties they purchase.

F. Conclusion

For the foregoing reasons, this Court should accept review of the Court of Appeals decision in this matter. This Court should reverse that decision and reverse the decision of the trial court granting summary judgment to Ticor and denying Campbell-Fereira's motion for summary judgment.

Dated: September 7, 2007

Respectfully submitted,



Richard D. Wall, WSBA#16581
Attorney for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 10th day of September 2007, a true and correct copy of the foregoing Petition for Review was hand delivered by attorney messenger service to the following:

Brooke Castle Kuhl, Esq.
Kirkpatrick & Lockhart Preston Gates & Ellis, LLP
618 West Riverside Avenue, Suite #300
Spokane, WA 99201

Dated this 10th day of September 2007.

Cheri L. Casper

Cheri L. Casper

APPENDIX

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DALE CAMPBELL and TINA FEREIRA,	**No. 25327-9-III**
Appellants,	**Division Three**
v.	
TICOR TITLE INSURANCE COMPANY,	**UNPUBLISHED OPINION**
Respondent.	

SWEENEY, C.J.—An insurance company, including a title insurance company, is obligated to defend its insured when a claim arguably falls within the coverage provisions of its policy. Landowners who owned a title insurance policy were sued. A neighbor sued the landowners to "reform" an easement that did not burden the landowners' property. If relief was granted, the easement would have then burdened the landowners' property. The title company insured the landowners' title and it refused to defend the lawsuit. The landowners sued the title company. We conclude that the lawsuit clearly did not fall within the coverage of the title policy. The potential encumbrance was not of public record within the meaning of the policy. And we therefore affirm the trial judge's summary dismissal of the suit against the title company for denying coverage.

FACTS

Dale Campbell and Tina Fereira (Campbell-Fereira) own property on Deer Lake, Washington. They bought title insurance from Ticor Title Insurance Company.

Ticor insured against: (1) title to the estate or interest being vested in a manner other than stated; (2) any defect, lien, or encumbrance on the title; (3) unmarketability of title; and (4) lack of right of access to and from land. Ticor also agreed to pay attorney fees and costs incurred in defense of the title.

Ticor, however, excluded coverage for loss or damage for easements not disclosed by public records. It also excluded coverage for encroachments and questions of location, boundary, and area disclosed by a survey.

Jerry Edwards owns the property adjacent to the Campbell-Fereira lot. Mr. Edwards claimed a right to cross over the Campbell-Fereira property to access Deer Lake based on a "Declaration of Pedestrian Easement" recorded on December 5, 1996. The "Declaration of Pedestrian Easement" described an easement to access a dock on Deer Lake on "Lot B." Lot B is owned by the Gromo Family Trust (Gromo). The Gromo house lies immediately to the south of the Campbell-Fereira property. Mr. Edwards sued Campbell-Fereira to enforce the claim.

Mr. Edwards alleged that the original grantors of the Edwards property (Lot C), the Gromos property (Lot B), and the Campbell-Fereira property (Lot A) intended a

pedestrian easement between the Campbell-Fereira house and the house immediately to the south, the Gromo house.

The Gromos claimed that Mr. Edwards has no pedestrian easement since it is blocked by their home. The fact that the pedestrian easement ran through the Gromos' house was discovered after a survey in 2002. Mr. Edwards prayed that the Gromos and Campbell-Fereira deeds be *reformed* "to reflect the true intention of the Vickerys as the original grantor" to provide him with a pedestrian easement. Clerk's Papers (CP) at 17. Mr. Edwards wants access over property that now belongs to Campbell-Fereira and the Gromos.

Campbell-Fereira tendered defense of the suit to Ticor. Ticor denied coverage and refused to defend. Ticor relied on its policy's exclusion for "easements, prescriptive rights, rights of way, streets, roads, alleys or highways not disclosed by the public record." CP at 65-66. And it responded that "[i]t is uncontroverted that on the date that Ticor's title policy was issued to Ms. Fereira and Mr. Campbell, there was no easement of record across their property in favor of Lot C [the Edwards property]." CP at 66. Ticor also refused coverage because the policy excluded defects, liens, encumbrances, adverse claims, or other matters "attaching or created subsequent to the date of the policy." CP at 66.

Campbell-Fereira sued Ticor and alleged that Ticor had wrongfully denied coverage, breached its duty of good faith, and violated Washington's Consumer

Protection Act. Everyone moved for summary judgment, and the trial court dismissed Campbell-Fereira's complaint.

DISCUSSION

DUTY TO DEFEND

Campbell-Fereira argues that Ticor reads its policy too narrowly and too restrictively to deny its duty to defend. They note that the easement here was disclosed by public record. The only dispute was the legal effect of the easement and, specifically, whether it affected the Campbell-Fereira lot.

Ticor responds that on the date it issued the policy there was no recorded easement benefiting the Edwards property or burdening the Campbell-Fereira land. It notes that the Edwards complaint asked the court for reformation of the easement to burden the Campbell-Fereira land. Ticor then concludes that under the clear language of the policy it had no duty to defend.

We review the trial court's grant of summary judgment de novo. *Overton v. Consol. Ins. Co.*, 145 Wn.2d 417, 429, 38 P.3d 322 (2002). A motion for summary judgment will be granted only when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c); *Overton*, 145 Wn.2d at 429. Here, the facts are undisputed. And the only question turns on the legal consequences which attend those facts—was there a duty to defend.

And interpretation of an insurance policy is a question of law. *Id.* at 424; *Pub. Util. Dist. No. 1 v. Int'l Ins. Co.*, 124 Wn.2d 789, 797, 881 P.2d 1020 (1994). We construe the policy as a whole and give effect to each provision. *Overton*, 145 Wn.2d at 424. The terms of the insurance policy should be given a "'fair, reasonable, and sensible construction as would be given to the contract by the average person purchasing insurance.'" *Id.* (quoting *Sears v. Grange Ins. Ass'n*, 111 Wn.2d 636, 638, 762 P.2d 1141 (1988)). We are also bound by definitions provided in the specific policy. *Overton*, 145 Wn.2d at 427; *Kitsap County v. Allstate Ins. Co.*, 136 Wn.2d 567, 576, 964 P.2d 1173 (1998).

The duty to defend arises when a lawsuit is filed against the insured alleging facts and circumstances which fall within the coverage of the policy. *Kirk v. Mt. Airy Ins. Co.*, 134 Wn.2d 558, 561, 951 P.2d 1124 (1998). But an insurer has no duty to defend claims that are not covered by the policy. *Id.*

Ticor relies on the exceptions to coverage set out in its policy:

> This policy does not insure against loss or damage (and the Company will not pay costs, attorneys' fees or expenses) which arise by reason of GENERAL EXCEPTIONS:
>
> . . . .
>
> C. Easements, prescriptive rights, rights-of-way, streets, roads, alleys or highways not disclosed by the public records.

CP at 59.

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The easement at issue here was not disclosed by public record. There was no recorded easement benefiting Mr. Edwards' property and burdening Campbell-Fereira's land on the date Ticor issued this policy. Indeed, Mr. Edwards' complaint asks the court to reform the easement so it will burden the Campbell-Fereira property in the future.

Under the policy's express terms, the "policy does not insure against loss or damage . . . which arise[s] by . . . [e]asements . . . not disclosed by the public records." CP at 59. Public records are "records established under state statutes at Date of Policy for the purpose of imparting constructive notice of matters relating to real property to purchasers for value and without knowledge." CP at 55.

Moreover, any question about whether the easement burdened the property first arose after a survey was conducted in 2002. This was a year after the title insurance became effective. And, there is no duty to defend against "[e]ncroachments and questions of location, boundary and area disclosed only by inspection of the premises or by survey." CP at 59.

We conclude that under the clear terms of this policy Ticor had no duty to defend.

ATTORNEY FEES

Ticor argues that the Campbell-Fereira appeal was frivolous and it is therefore entitled to attorney fees. And we can award fees and costs for a frivolous appeal. RAP 18.9(a); *Pain Diagnostics & Rehab. Assocs., P.S. v. Brockman*, 97 Wn. App. 691, 701, 988 P.2d 972 (1999), *review granted & case dismissed*, 140 Wn.2d 1013 (2000). An

appeal is frivolous when there are no debatable issues over which reasonable minds could differ, and there is so little merit that the chance of reversal is slim. *Brockman*, 97 Wn. App. at 701; *Goad v. Hambridge*, 85 Wn. App. 98, 105, 931 P.2d 200 (1997).

An appeal that raises clearly debatable issues is not frivolous for purposes of imposing sanctions under RAP 18.9(a). *Biggs v. Vail*, 119 Wn.2d 129, 138, 830 P.2d 350 (1992). Whether this title insurance company had the duty to provide coverage and defend this insured in a lawsuit to reform an easement or covenant on real property is not frivolous. RAP 18.9(a); *Dickins v. Stiles*, 81 Wn. App. 670, 672-78, 916 P.2d 435 (1996).

We affirm the trial judge's summary dismissal of the complaint and we deny Ticor's request for fees.

A majority of the panel has determined that this opinion will not be printed in the Washington Appellate Reports but it will be filed for public record pursuant to RCW 2.06.040.

Sweeney, C.J.

WE CONCUR:

Schultheis, J.

Kulik, J.

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